In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 461

FRIEDA SUFFIN, PETITIONER

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of November 12, 1968, inviting the Solicitor General to express the views of the United States. The Interstate Commerce Commission concurs in this memorandum.

STATEMENT

This is a derivative action by a stockholder of the Norfolk and Western Railway Company (N&W), seeking damages for alleged unfairness to N&W in the terms of an exchange of securities whereby the former Pennsylvania Railroad Company and a subsidiary thereof (together, Pennsylvania) divested themselves of N&W common stock in return for newly

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issued N&W debentures. The divestiture was ordered by the Interstate Commerce Commission in 1964 as a condition of its approval of N&W's acquisition of five railroads under Section 5 of the Interstate Commerce Act, 49 U.S.C. 5 (324 I.C.C. 1, 32–49). In 1966, in a proceeding under Section 20a of the Act, 49 U.S.C. 20a, the Commission authorized N&W to accomplish the divestiture by issuing the debentures here in question (328 I.C.C. 884).

The district court dismissed the complaint for lack of jurisdiction, holding that the terms of a securities exchange found just and reasonable by the Commission may not be attacked subsequently in a court action other than a three-judge court review proceeding. (276 F. Supp. 549, 553). The court of appeals affirmed *per curiam,* largely on the basis of the district court opinion (396 F. 2d 75).

DISCUSSION

1. As the plaintiff in a derivative action, petitioner does not, of course, assert any claim in her own right either against Pennsylvania or against the management of N&W. Rather, her claim is fundamentally that N&W is entitled to relief against Pennsylvania on the ground that the terms of the debenture transaction were allegedly unfair to N&W.

The Commission, in its proceeding under Section 20a, fully examined and evaluated the terms of the debenture transaction that petitioner questions, concluding, in the language of Section 20a(2) that the issue was "for a lawful object * * * compatible with the public interest * * * and * * * reasonably neces-

sary and appropriate for such purpose" (328 I.C.C. at 893). It found that the conversion price of the debentures was virtually the same as the then current price of N&W stock, and noted the improved net-earnings position which N&W claimed would result from the substantial tax benefits to the company through the debenture-for-stock exchange (328 I.C.C. at 888, 890–891). It expressed the view that the debenture exchange proposal—

> * * * should minimize the impact of Pennsylvania Company's divestiture program on the market price of applicant's [N&W's] common stock and contribute to the maintenance of its financial and credit standing, all of which is in the public interest *as well as in the best interest of the applicant and its security holders* [328 I.C.C. at 891, emphasis added].[1]

In our view, Section 20a, by requiring findings that the debenture issue in question is for "a lawful object * * * compatible with the public interest" and "reasonably necessary and appropriate for such purpose", called upon the Commission in this case to determine, as it did, that the terms were not detrimental to N&W as the issuer. This is so especially because the issue was an essential element in the merger ap-

[1] In the Section 5 proceeding the Commission had expressed concern lest the disposition of such a large block of N&W stock upset the market (with resulting adverse impact upon N&W stockholders) and suggested annual sales of the stock to N&W as an alternative to a secondary offering (324 I.C.C. at 40–41, 46). The Commission ordered that the divestiture take place over a ten-year period, during which it would retain jurisdiction to ensure that "orderly divestiture" was accomplished (324 I.C.C. at 46, 48).

proved in the Section 5 proceeding, as to which the Commission had the obligation to "pass upon and approve all capital liabilities which the merged company will assume or discharge as a result of merger." *Schwabacher* v. *United States,* 334 U.S. 182, 198. And the requirement that the Commission consider the fairness of the debenture terms precludes collateral consideration of that question subsequently in another forum, since all pertinent "rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable." *Id.* at 201. As the Court pointed out in *Schwabacher,* "the jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive and independent of all other state or federal authority." *Id.* at 197.[2]

Ordinarily, applications for authority to merge under Section 5 and to issue necessary securities under Section 20a are simultaneously filed and are consolidated for all purposes. If the merger is ultimately approved, the Commission authorizes the requisite stock issuance at the same time.[3] Here, however, the situation presented made a separate Section 20a proceeding appropriate after the terms of the divestiture required in the Section 5 order were

[2] Section 20a(7) provides: "The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein" (49 U.S.C. 20a(7)).

[3] *E.g., Pennsylvania Railroad Company-Merger-New York Central Railroad Company,* 327 I.C.C. 475.

worked out. But the separation of the two proceedings in time did not affect the applicability of the principles of *Schwabacher*—either with respect to the Commission's obligations to evaluate the debenture issue or with respect to the effect of that evaluation on private claims.[4]

Petitioner could have asserted her objections to the debenture issue in the Section 20a proceeding in which the Commission approved it. Moreover, it was open to her to seek judicial review of the Commission's decision in the normal manner. See *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 159–160. For the reasons stated, she may not, however, litigate the fairness of the debenture issue collaterally in the present derivative action, and the district court properly dismissed this complaint for lack of jurisdiction.

2. Petitioner further appears to contend that her derivative claim should not be barred by the Commission's action because the Commission did not give her and the other stockholders of N&W specific notice of the Section 20a proceeding. She does not, however,

[4] Petitioner's reliance upon *New York Central Securities Corp.* v. *United States*, 387 U.S. 12, and *Pittsburgh & W. Va. Ry.* v. *United States* 281 U.S. 479, is misplaced. If the former case, involving a proceeding under Sections 5 and 20a, stands for the proposition that questions concerning the fairness of an indenture to minority stockholders cannot be determined by the Commission in such proceedings (a proposition that is not altogether clear from the opinion), then it is overruled by *Schwabacher*. The *Pittsburgh* case did not relate to either a merger or an issuance of securities; the Court merely held that a minority stockholder could not raise, in a three-judge court reviewing the grant of certificates of public convenience and necessity, the claim that the actions approved by the Commission were improperly taken as an internal corporate matter.

contend that the Commission failed to follow the notice requirements specified in Section 20a. She conceded in the district court that the Section 5 notice provisions are "adequate and do not violate due process" (276 F. Supp. at 554 n. 9), and in fact she would have been entitled to no more notice than was given had the Section 5 and Section 20a proceedings been held concurrently. In any event, as a derivative plaintiff she stands in the corporation's shoes and cannot complain that personal notice to her is required for the corporation to be bound by a proceeding in which it participated. Finally, both the district court (276 F. Supp. at 554) and the court of appeals (396 F. 2d at 77 n. 4) found that petitioner had received adequate actual notice by virtue of N&W's proxy statements.

CONCLUSION

For the foregoing reasons, we believe that the result reached by the courts below was correct. This case involves unique circumstances. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1968.

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